

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BENJAMIN FRANKLIN SCOTT,

Petitioner,

v.

Civil Action No. 1:06CV163
Criminal Action No. 1:02CR27
(Judge Keeley)

UNITED STATES OF AMERICA,

Respondent.

ORDER AFFIRMING REPORT AND RECOMMENDATION, AND
SETTING EVIDENTIARY HEARING

On April 27, 2004, a jury convicted the *pro se* petitioner, Benjamin Franklin Scott ("Scott"), of being a felon in possession of a firearm. On November 8, 2006, pursuant to 28 U.S.C. § 2255, Scott filed a motion to vacate, set aside, or correct his federal sentence on the grounds of ineffective assistance of counsel and prosecutorial misconduct.¹

In its response to Scott's motion, the government requested that the Court schedule an evidentiary hearing to resolve the factual issues raised in the petition. In Scott's subsequent reply, he concurred in the government's request for an evidentiary hearing. On December 28, 2006, United States Magistrate Judge John S. Kaull

¹ In a third argument, Scott also seeks the retroactive application of a two-level sentence reduction for acceptance of responsibility under the United States Sentencing Guidelines.

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issued a Report and Recommendation ("R&R") recommending that the parties' requests for an evidentiary hearing be granted, and further, that Scott's pending request to proceed as a pauper be granted and that counsel be appointed to represent him at the evidentiary hearing. On March 29, 2007, Scott filed a response reiterating his request for an evidentiary hearing, if the Court determined that his due process rights had not been violated by the government's original request for an evidentiary hearing. The Court finds no such violation.²

Accordingly, the Court **AFFIRMS** the magistrate judge's R&R (doc. no. 7), **GRANTS** Scott's motion for leave to proceed *in forma pauperis* (doc. no. 2), **SCHEDULES** an evidentiary hearing on Scott's § 2255 motion for **Friday, August 24, 2007 at 1:30 p.m.** at the **Clarksburg, West Virginia**, point of holding court, and **APPOINTS** attorney Deanna Pennington to represent Scott at that hearing.

² On March 13, 2007, Scott filed a separate document styled "Petitioner's Objection", objecting to the government's alleged interview of a witness Scott apparently intends to call in support of his § 2255 motion. (Doc. No. 11.) Although docketed as an "objection", the Court finds that the document raises no objection to the R&R, but rather raises issues appropriate to address at the forthcoming evidentiary hearing.

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The Clerk is directed to transmit copies of this Order to counsel of record, the defendant and all appropriate agencies.

DATED: July 27, 2007

/s/ Irene M. Keeley

IRENE M. KEELEY

UNITED STATES DISTRICT JUDGE